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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 236

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Petitioner (Plaintiff-Appellant below),

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE,

Respondents (Defendants-Appellees below),

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE,

Respondents (Defendants-Appellees below),

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, United States of America, for the Use and Benefit of Midland Loan Finance Company, a corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, to review a judgment of that Court entered on April 24, 1939 (R. 107-108), affirming a judgment of the United States District Court for the District of Minnesota, Fourth Division, which latter judgment dismissed plaintiff's cause of action on its merits (R. 89).

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action was brought on an acting postmaster's bond to recover damages sustained by the use plaintiff—hereinafter referred to as the plaintiff—through the acting postmaster's tortious misdelivery of letters mailed by plaintiff to the post office at Montgomery, Minnesota. Patrick J. Malone, the acting postmaster—hereinafter referred to as the "postmaster"—and the National Surety Corporation, the surety on the bond—referred to as the "surety"—were joined as defendants.

A jury found that the postmaster misdelivered the plaintiff's mail, in violation of the Postal Regulations and in violation of the bond sued on, and that the plaintiff sustained a loss aggregating at least $16,000, the amount of the verdict and the penal sum of the bond (R. 72). The verdict was returned against both defendants (R. 63), but the District Court later dismissed the action.

The District Court ordered dismissal of the action as to the surety on two grounds: (1) That the bond covered only such losses as might be sustained by the Government itself. (2) That the action was brought without the consent of the United States (R. 67, 70-87; 23 Fed. Supp. 411). The Court rejected the plaintiff's view: (1) That the statute requiring the bond (39 *U. S. C. A.*, Sec. 34) manifests an intention to benefit users of the mails as well as the Government. (2) That, by legal intendment, flowing from such intention, mail-users have a remedial right to sue on such bonds in the name of the United States.

The action was dismissed by the District Court, as to the postmaster, on the sole ground that, because the surety had

been dismissed from the action, diversity of citizenship was destroyed and the Court had no jurisdiction to proceed with the action between the remaining parties, both residents of Minnesota (R. 88).

The District Court's final judgment of dismissal was entered June 14, 1938 (R. 88).

August 18, 1938, plaintiff petitioned for leave to appeal to the Circuit Court of Appeals (R. 92-93). August 19, 1938, the appeal was allowed (R. 91) and notice of the appeal was served August 23, 1938 (R. 90).

In the Circuit Court of Appeals, pursuant to an opinion filed April 21, 1939 (R. 101; 103 Fed. (2d) 450), judgment was entered April 24, 1939, affirming the judgment of the District Court (R. 107-108). Petition for re-hearing (R. 109-113) was denied May 10, 1939 (R. 115), and this petition for a writ of certiorari follows.

A certified copy of the entire transcript of the record of all proceedings in the Circuit Court of Appeals is filed herewith.

The history of the rulings made in this case, as to the right of a user of the mails to maintain an action of this kind, is as follows:

Judge Joyce of the District Court, overruled defendants' separate demurrers to the complaint (R. 27-30), basing his order on *Howard vs. United States*, 184 U. S. 676 (R. 29). He ruled that that decision supported plaintiff's right to sue.

Judge Nordbye, who tried the case in the District Court, dismissed the action on the ground that a private mail-user could not sue on a postmaster's bond without the Government's consent. He ruled that Congress had not manifested intention to permit such suit (R. 87; 103 Fed. Supp. 420). Judge Nordbye intimated that the Government could have

sued on the bond and would have been under a *moral* obligation to disburse the proceeds of recovery to this plaintiff (R. 81; 103 Fed. Supp. 417), and that had the Attorney General consented the action might have been brought in its present form (R. 84; 103 Fed. Supp. 419).

The Circuit Court of Appeals followed substantially the same reasoning as did Judge Nordbye. The Court of Appeals treated the case as involving but one question—whether or not a private user of the mails could sue, without the consent of the Government, upon a postmaster's bond (R. 102; 103 Fed. (2d) 450). (It will be noted that the Court did not do what was done in the analogous case of *Howard vs. United States*, 184 U. S. 676, divide the question, by inquiring, first, whether the bond was intended by Congress to benefit private persons, and, second, if so, whether a private person could sue on the bond without any consent of the Government other than that to be inferred from the intention manifested by the Congress.)

A.

QUESTIONS PRESENTED.

1. Does a postmaster's bond, conditioned, as required by 39 *U. S. C. A.*, Sec. 34, for "faithful discharge of all duties and trusts imposed on him" by law or regulations of the Post Office Department, inure to the benefit of private users of the mail, as well as the Government itself, in view of the existence of regulations forbidding the postmaster to make unauthorized delivery of letters, etc.?

2. If the last stated question be answered affirmatively, has Congress manifested intent that a user of the mails shall have a right to sue on the bond in the name of the United

States for his own use, without first securing consent of an administrative officer of the Government?

The Circuit Court of Appeals recognized that, under the decision in *Howard vs. United States*, 184 U. S. 676, a private person may sue on the bond of a federal officer, although, in form, the United States is named as the sole obligee of the bond, where the nature of the duties of the officer toward both the Government and private persons is such that it may be inferred that Congress intended that the bond cover both public and private rights. The Circuit Court of Appeals recognized that, under *Howard vs. United States, supra,* consent of the United States to the bringing of a suit by a private person in the name of the United States on such a bond may be assumed to arise by legal intendment, flowing from interpretation of the bond as being for private, as well as public, benefit (R. 105-106; 103 Fed. (2d) 452).

But the Circuit Court of Appeals decided that, despite the close resemblance between the wording of the federal court clerk's bond involved in the *Howard Case, supra*, and the bond here involved, and despite the close resemblance between the statutes under which the bonds were respectively given, there was no room for holding that a postmaster's bond inures to private, as well as public, benefit (R. 106; 103 Fed. (2d) 452).

In so holding, we believe that the Circuit Court of Appeals erred, both in its interpretation of 39 *U. S. C. A.*, Sec. 34—the statute under which the bond here involved was given—and in its holding that the principle of the *Howard Case* does not here apply.

B.

STATEMENT OF FACTS.

As noted in the opinion of the Circuit Court of Appeals (R. 102; 103 Fed. (2d) 451), the material facts are not in dispute.

The principal underlying facts are thus concisely stated by the Circuit Court of Appeals:

> "The appellant [plaintiff] is a corporation engaged in the automobile finance business at Minneapolis, Minnesota. It purchases contracts of sale from automobile dealers. Thomas Hunting was such a dealer at Montgomery, Minnesota, where the defendant Malone was acting postmaster. Hunting sold to the appellant conditional sales contracts including the installment notes of the purchasers. In submitting contracts and notes to appellant, Hunting gave credit references. Appellant addressed letters to the [supposed] makers of the contracts and to the credit references at Montgomery. At the request of Hunting the postmaster [defendant Malone] delivered to him substantially all letters received at Montgomery in appellant's envelopes. Hunting then sold to appellant spurious contracts made in the names of fictitious persons with fictitious credit references. Since he received the mail addressed to such fictitious names he was enabled to defraud the appellant of the moneys for which damage is sought in this action. It is not claimed that any of the lost funds came into the possession of the acting postmaster or that he had any knowledge of the fraud that was being perpetrated by Hunting. The appellant not only did not consent to the delivery of its letters to Hunting, but it was ignorant of the fact that they were not delivered to the persons addressed" (R. 103; 103 Fed. Supp. (2d) 451).

(The above quoted statement by the Circuit Court of

Appeals, to the effect that it is not claimed that the postmaster "had any knowledge of the fraud that was being perpetrated by Hunting," should be qualified, as shown by part of Judge Nordbye's opinion quoted below, by stating that the testimony did not *directly* "establish that Malone was knowingly a party to the fraud." The Record does not negative a finding by the jury, on competent *circumstantial* evidence, that the postmaster did know of the fraud that was being perpetrated upon plaintiff.)

The facts, as above summarized by the Circuit Court of Appeals, were amplified, and some additional material facts stated, in the opinion of Judge Nordbye, who tried the case in the District Court (R. 70-72; 23 Fed. Supp. 412-413). As shown by Judge Nordbye's statement of the facts, plaintiff, in addition to sending letters to the fictitious conditional buyers of cars, sent through the mails books for the recording of payments, insurance certificates, and receipts for payments ostensibly made by such buyers but actually made by Hunting. Judge Nordbye found:

> "By reason of the arrangement between Hunting and the defendant Malone, the correspondence, inquiries, etc., did not reach the persons to whom the letters were addressed, but were received by Hunting instead, and in this manner he was able to dupe the plaintiff for a long period of time. * * * The evidence fairly established that plaintiff honestly believed that the contracts were *bona fide*, and also believed that the replies that it received from various credit references were genuine. It believed and relied upon the integrity of the United States mails and honestly assumed that the various mail matter addressed in connection with the contracts that it had purchased was being delivered to the persons to whom such mail matter was addressed. The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not directly estab-

lish that Malone was knowingly a party to the fraud. Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to convince Malone that it was perfectly proper for the 'Midland mail' to be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, *contrary to the Postal Laws and Regulations*, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict" (R. 72; 23 Fed. Supp. 412-413). (Italics supplied.)

Condition of Bond.

The bond here involved was given in the sum of $16,000 and conditioned

"That * * * Malone * * * faithfully discharge all duties and trusts imposed upon him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System" (R. 19).

Statutes Involved.

39 *U. S. C. A.*, Sec. 34: "'Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the

Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department. * * * The bond of any married woman who may be appointed postmaster shall be binding upon her and her sureties, and she shall be liable for misconduct in office as if she were sole." (The last sentence is here important only as use of the phrase, "misconduct in office," may be deemed to throw light on the phrase in the first sentence, "faithful discharge of all duties and trusts imposed * * * by law or the rules and regulations of the department.")

5 *U. S. C. A.*, Sec. 377: "All bonds taken * * * by the Post Office Department shall be made to and with the United States of America."

Regulations Violated by Postmaster.

That the postmaster did not faithfully discharge the duties and trusts imposed upon him by regulations of the department is manifest upon a comparison of the facts found by the lower courts with the Postal Regulations.

Duties imposed upon postmasters by Postal Regulations (1932) and obviously for the principal if not sole benefit of users of the mails—are imposed as follows: Sec. 702, par. 1, prohibiting postmasters to "give to unauthorized persons information concerning mail matter," or to withhold delivery of mail to the addressees (R. 11). Sec. 703, pars. 1, 2, forbidding postmasters to "permit to have access to any mail matter in the post office any persons except sworn assistants," etc. (R. 11-12). Sec. 775, par. 1, requiring letters addressed to fictitious persons, without specific address, to be sent to the Division of Dead Letters unless the envelope contains the card of the sender, in which latter case return must be made to the sender (R. 12). (Plaintiff's return

card was on all envelopes sent through the Montgomery post office (R. 8).) Sec. 777, par. 1, requiring mail matter to be delivered to the addressee or to his written order (R. 12-13).

Government's Relation to Bond.

There is no contention on the part of the Government or the surety that the Government or any one other than plaintiff asserts any claim against the bond here involved, or that potential claims against it exist. The bond was supplanted by a new one given when defendant Malone was elevated from acting postmaster to postmaster (R. 84). Plaintiff's claim and rights arise under the superseded bond only.

Reference is made in the opinions of both of the lower courts to the fact that administrative officers of the United States did not consent to the bringing of this action (R. 84, 23 Fed. Supp. 419; R. 102; 103 Fed. (2d) 450). By this is meant consent of the Attorney General, as distinguished from the point whether or not the Congress has manifested intention that a private person may sue on a postmaster's bond. With all respect for the opinions of the lower courts, we believe that it is the intention of Congress that is here controlling. But, because the absence of the Attorney General's consent was considered by the lower courts, it is important that his position be here understood. In a letter to counsel for plaintiff, dated September 22, 1936, the Department of Justice said, with respect to consent to bringing of suit in the name of the United States:

> "This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as stated by you, the claim is the exclusive property of your client. The bond of the Acting Postmaster was executed in accordance with the provisions of R. S. 3834, as amended, U. S. C., Title 39, Section 34. Whether the sureties on a bond executed in accordance with the provisions of this section are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General."
>
> "In the circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it" (R. 58-59).

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The discretionary power of this Court is invoked upon the following grounds:

1. The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

The importance of the questions whether a postmaster's bond extends to the benefit of private mail-users, and, if so, whether they have a right to sue on the bond in the name of the United States is obvious. That neither of these questions has been decided by this Court is undisputed, excepting as the principles laid down in *Howard vs. United States*, 184 U. S. 676, require a decision in our favor. If the Circuit Court of Appeals did not err in holding that the *Howard Case* is distinguishable, then there is no decision of this Court nor of any other federal court, on the right of a private mail-user to sue on a postmaster's bond, excepting the decisions of the lower courts in the case at bar. The only

other decisions on that point were rendered by state courts as follows:

Idaho Gold Reduction Co. vs. Croghan, 6 Idaho 471.

United States vs. Griswold, 6 Ariz. 453 (dictum).

2. The Circuit Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court, including, among others:

Howard vs. United States, 184 U. S. 676, which holds that an official bond of a federal court clerk, given under a closely resembling statute and containing closely resembling conditions, could be sued on by a private person, in the name of the United States, although the United States was the only obligee named in the bond.

Teal vs. Felton, 12 How. 284, which holds that a postmaster's wrongful withholding of mail matter from the addressee is a conversion for which the addressee can sue the postmaster.

Crooks vs. Harrelson, 282 U. S. 55, 60, which holds that the letter of an act of Congress is controlling unless a contrary intention is plainly manifested.

Smith vs. United States, 170 U. S. 372, 381, which holds that fair protection of those dealing with a bonded Government official should not be defeated through "any refined reasoning."

New Jersey Steam Nav. Co. vs. Boston Merchants Bank, 6 How. 344, which holds that a bailor has a right to sue on a contract between the bailee and a third person concerning the bailed property.

3. The decision of the Circuit Court of Appeals is in conflict with decisions of other circuit courts of appeals on the same matter, including, among others, the following decisions:

United States vs. American Surety Co. (C. C. A. 4), 163 Fed. 228.

Gibson vs. United States (C. C. A. 1), 208 Fed. 534.

United States Fidelity & Guaranty Co. vs. United States (C. C. A. 9), 246 Fed. 433.

Massachusetts Bonding & Ins. Co. vs. United States (C. C. A. 7), 54 Fed. (2d) 1039.

United States vs. Abeel (C. C. A. 5), 174 Fed. 12.

United States vs. United States Fidelity & Guaranty Co. (C. C. A. 6), 247 Fed. 16.

American Surety Co. vs. United States (C. C. A. 5), 133 Fed. 1019.

23 *Opinions, Attorneys General*, 476, 479,

Which cited decisions establish coverage under bonds similar to the one here involved for the benefit of private persons?

4. The decision of the Circuit Court of Appeals is in conflict with its own decisions in the following cited cases, among others:

Bosler vs. United States (C. C. A. 8), 26 Fed. (2d) 4.

Howard vs. United States (C. C. A. 8), 102 Fed. 77.

National Surety Co. vs. United States (C. C. A. 8), 129 Fed. 70,

Which cited decisions established the right to private benefits under bonds running to the United States.

Complying with the rule of this Court, requiring that all issues upon which decision is requested be presented in a petition for certiorari, we have herein presented and outlined those issues, in the statement of our reasons for allowance of the writ; but, in attempting the brevity of statement required by Rule 38, par. 2, we have not set forth all of

the points, nor all of the contentions in support thereof, that will be urged at the argument on the merits of this cause in the ewent that the writ prayed for shall be granted. Petitioner here refers to and incorporates into this petition, by reference, all of the matters presented in the petition for rehearing filed below (R. 110-113), and in the proposed assignments of error contained in the brief accompanying this petition with the same force and effect as if herein set out in full.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated July 24, 1939.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Petitioner (Plaintiff-Appellant below),

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Respondents (Defendants-Appellees below),

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (May 16, 1938) is reported at 23 Federal Supplement 411-420, and the opinion of the Circuit Court of Appeals (April 21, 1939) is reported at 103 Federal Reporter (2d) 450-453.

JURISDICTION OF THIS COURT.

The judgment of the Circuit Court of Appeals was entered April 24, 1939 (R. 107-108). Petition for re-hearing, seasonably filed in the Circuit Court of Appeals, was denied May 10, 1939 (R. 115).

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925, Ch. 229, Sec. 1 (43 Stat. 938; 28 *U. S. C. A.*, Sec. 347).

Statement of the specific claims advanced, and rulings made, in the lower court which are relied upon as a basis of this Court's jurisdiction, and of the cases believed to sustain the jurisdiction, are set forth in the foregoing petition, under the head of "Questions Presented" and "Reasons Relied on for Allowance of the Writ." For brevity's sake we adopt that statement as a part of this Brief by reference.

STATEMENT OF THE CASE.

The facts, so far as material to the questions presented, have been stated in the foregoing petition. To avoid considerable repetition, the statement of the case, as presented in the petition, under the head, "Summary and Short Statement of the Matter Involved," including sub-captions thereunder, is hereby adopted as a part of this Brief.

SPECIFICATION OF ERRORS ASSIGNED.

The errors which the petitioner will urge, if the writ of certiorari prayed for be granted, are that the Circuit Court of Appeals erred:

1. In holding that but a single question was presented to the Court, and that that question was whether a mail-sender could sue on a postmaster's bond, without the consent of the Government, for unauthorized delivery of the mail to one other than the addressee (R. 102; 103 Fed. (2d) 450), because the principal question presented to the Court was whether or not the statute requiring the bond permits

a mail-user to sue on such bond without any further consent of the Government than appears by legal intendment in that statute.

2. In holding that it was not claimed that the defendant postmaster "had any knowledge of the fraud that was being perpetrated by Hunting"—the person to whom the mail was unauthorizedly delivered (R. 103; 103 Fed. (2d) 451), because the Record shows that it was merely found in the trial court that, although the testimony indicated that the postmaster knew of Hunting's business relations with plaintiff, it did not *directly* establish that Malone was knowingly a party to the fraud (R. 72) and because the evidence does not negative a finding by the jury on competent *circumstantial* evidence that the postmaster did know of the fraud that was being perpetrated upon plaintiff.

3. In holding that regulations of the Post Office Department may be considered in determining whether or not 39 *U. S. C. A.*, Sec. 34, manifests intention of Congress that mail-users should be protected by a postmaster's bond (R. 106; 103 Fed. (2d) 452).

4. In holding that no inference may be drawn from 39 *U. S. C. A.*, Sec. 34, and related statutes that Congress intended to extend the protection of the bond to private mail-users (R. 106; 103 Fed. (2d) 452).

5. In holding that the decisions of this Court and other authorities cited by plaintiff "fall far short of establishing the proposition that the bond in suit was required for the direct benefit of private mail-users, or that a legal intendment permitting them to sue on the bond should be read into the statute" (R. 106; 103 Fed. (2d) 452).

6. In refusing to hold that, even if the "primary" or

"dominant" purpose of 39 *U. S. C. A.*, Sec. 34, in requiring bonds of postmasters be deemed to be the protection of the Government in its fiscal and other relations with the postmasters, plaintiff is nevertheless entitled to recover as a "secondary" beneficiary of the bond, because the Government has no actual or potential claim against the bond.

7. In affirming the judgment of the District Court (R. 107-108); such judgment not being supported by the law or the evidence and being contrary thereto.

8. In deciding that plaintiff is not entitled to recover, such decision being contrary to the law and the evidence.

9. In holding that the Court's conclusions were not inconsistent with those decisions in which the Government in actions brought by it upon similar bonds has recovered for theft of letters and the like, irrespective of the Government's liability to the mail-user (R. 106-107; 103 Fed. (2d) 452-453).

SUMMARY OF ARGUMENT.

The points hereinafter argued follow the reasons relied upon in the petition for allowance of the writ, and, for brevity's sake, are not here repeated.

ARGUMENT.

I.

The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

Although this Court has never determined the question whether or not suit can be brought by, or on behalf of, a private mail-user on a postmaster's bond on account of a breach of official duty toward the mail-user, we have consistently urged throughout this litigation, and still assert, that the question is virtually answered by the decision in *Howard vs. United States*, 184 U. S. 676. There is no essential difference in the facts of the two cases, nor in the statutes involved, excepting as an essential difference be deemed to arise from the circumstance that, in the *Howard Case*, the bond given for faithful performance of official duties was given by a clerk of a federal court, whereas the bond here involved was given by a postmaster.

If the last mentioned circumstance is, and we claim it is, unessential—if there is an analogy between the dual relationship of a federal court clerk to private litigants and to the Government, on one hand, and the dual relationship of a postmaster to private mail-users and to the Government—then the decision of the Circuit Court of Appeals is erroneous, and the judgment appealed from should be reversed. If, on the other hand, that Court was right in holding that the *Howard Case* is distinguishable, on the ground of a lack of analogy in the relationship of federal court clerks and postmasters to private persons, then the highly important questions of federal law whether or not a private mail-user is a beneficiary of a postmaster's bond, and has a right to

sue thereon in the name of the United States and for his own benefit are indisputably questions that have not yet been settled by this Court. That the question should be settled by this Court is a self-evident proposition.

Neither of the lower courts and neither of the defendants have claimed that the question has been settled by this Court. The position of the Circuit Court of Appeals as to supporting adjudications on the precise questions is limited to decisions of the supreme courts of Idaho and Arizona. The Court says:

> "Support for these conclusions will be found in *Idaho Gold Reduction Co. vs. Croghan*, 6 Idaho 471, 56 P. 164; *United States vs. Griswold*, 8 Ariz. 453, 76 P. 596; 49 *C. J.* 1455."

The gist of the decision in the *Idaho Gold Reduction Case, supra*, was that a private party could not sue on a postmaster's bond in the absence of a statute permitting it, and that the Court knew of no such statute.

When *Howard vs. United States*, 184 U. S. 676, was before this Court plaintiffs in error in that case cited the *Idaho Gold Reduction Co. Case* as supporting a contention that an official bond must be deemed to be for the sole benefit of the governmental agency requiring it, in the absence of a statute expressly giving a right of action to individuals (see 46 L. Ed. 754, 2d col.). Having reached a conclusion contrary to that contention, it is perhaps not strange that this Court did not mention the Idaho case in its opinion. In any event, neither this Court nor any other federal court has sanctioned the doctrine of the Idaho case, excepting the sanction given by the courts below in the case at bar.

Furthermore, the opinion of the Idaho court indicates that the decisive factor in the case was probably the facts that

there was nothing in the record to show to whom the bond was given, excepting as that could be inferred from the federal statutes, and that there was no showing as to what were the conditions of the bond there sued on.

As to the Arizona case, *United States vs. Griswold, supra*, we believe that the Circuit Court of Appeals misconceived the force and effect of that decision. The action in that case was brought by the Government itself for the benefit of the sender of a registered letter. Therefore, the statement by the Arizona Supreme Court in that case that the senders could not maintain a suit on the postmaster's bond in their own name to recover for the loss of the registered package was dictum. (It will be noted that the Court does not go so far as to say that a sender could not sue in the name of the United States.) Apparently, this dictum has never been approved by any federal court, excepting by the courts below in the case at bar.

Disregarding the Arizona court's dictum on the question of *remedial* right, it will be noted that the opinion supports our position—and is opposed to the conclusions reached by the Circuit Court of Appeals—on the substantive question as to whether or not mail-users are beneficiaries of postmasters' bonds. The Court distinctly held that a postmaster's bond to faithfully discharge his duties is violated by misconduct of a postmaster toward a sender of mail. In that respect the Arizona decision is in line with this Court's holding in the *Howard Case* that a similar bond extended to the benefit of private persons as well as the Government. But the dictum as to the right of such persons to sue to enforce that benefit is directly opposed to this Court's further holding in the *Howard Case* that the right to sue followed by legal intendment.

As to the Circuit Court of Appeals' citation to 49 *C. J.*

1455—probably intended to refer to 49 *C. J.* 1147, Sec. 56—the statement in the text that "it is well settled that, in the absence of special statutory authorization, a private person cannot sue on a postmaster's official bond for money coming into his hands in his official capacity and lost through his negligence or default," is supported only by citation of the decisions in the Idaho and Arizona cases above cited, and is directly opposed to the decision of this Court in the *Howard Case*, to the effect that legal intendment is a substitute for "special statutory authorization."

Although this Court decided in *Teal vs. Felton*, 12 How. 284, that the wrongful withholding of mail matter by a postmaster from an addressee was a conversion for which the addressee might sue the postmaster, no claim has been made by counsel for any of the parties to this action or by either of the lower courts that this Court has ever passed on the question here presented, as to coverage of a postmaster's bond. All that has been claimed is that the decisions in the following cited cases bear analogies to the case at bar:

Howard vs. United States, 184 U. S. 676.

Washington vs. Young, 10 Wheat. 404, distinguished in the *Howard Case*.

Munroe vs. Raphael, 288 U. S. 485.

II.

The Circuit Court of Appeals Has Decided a Federal Question in a Way That Conflicts With Applicable Decisions of This Court.

The decision of the Circuit Court of Appeals, that the bond sued on was not required for the direct benefit of private mail-users, and that no legal intendment permitting them to sue should be read into the statute (R. 106; 103 Fed. (2d) 452) is in conflict with this Court's decision in *Howard vs. United States*, 184 U. S. 676.

In the *Howard Case*, as here, a statute required a federal administrative official—a federal court clerk—to give a bond naming the United States as obligee, without any specification as to who should be beneficiaries of the bond. There, as here, the condition of the bond was for the faithful performance of official duties. The essential requirement of the statute involved in the *Howard Case* was that a federal court clerk give a bond "faithfully to discharge the duties of his office," etc. (184 U. S. 681-682). The essential requirement of 39 *U. S. C. A.*, Sec. 34, is that every postmaster give a bond for the "faithful discharge of *all* duties and trusts imposed on him either by law or the rules and regulations of the department," etc. (Italics supplied.) The bond in the *Howard Case* was in the penal sum of $20,000 (184 U. S. 677) under a statute which did not permit requirement of a bond in a greater sum than $40,000. The $16,000 bond here involved was given under a statute that imposed no limit on the penalty that might be exacted (39 *U. S. C. A.*, Sec. 34).

In the *Howard Case* it was argued by defendants "that, the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the

Government," and that no suit could be brought on it for the benefit of a private person (184 U. S. 687). The Circuit Court of Appeals takes the same position as to the bond here involved (R. 106; 103 Fed. (2d) 452).

This Court decided in the *Howard Case* that Congress "intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to $40,000" (184 U. S. 687).

In the *Howard Case* it was further contended that, "even if the bond was for the protection of individual litigants, it could not be put in suit by a private person, unless with the consent of the United States expressed in an act of Congress" (184 U. S. 690). This Court decided that "Congress intended that the required bond should protect private suitors as well as the United States, and, therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be the legal intendment of existing statutory provisions" (184 U. S. 692).

In the case at bar the Circuit Court of Appeals seems to recognize that the decision in the *Howard Case* is here controlling excepting as there is such difference in the relationship of federal court clerks and of postmasters to private persons dealing with them as to justify a holding that Congress did not intend that users of the mails should be benefited by postmasters' bonds (R. 106; 103 Fed. (2d) 452). The Circuit Court of Appeals does not attempt to distinguish the *Howard Case* on the ground of an essential difference in statutory provisions. Its position is thus stated, in commenting on the *Howard Case:*

> "We are urged to find a similar legal intendment in the statute under which the bond in suit was taken. In this connection it is said that the letter of the statute

confers benefits upon users of the mails as well as upon the Government; that the postal regulations relating to the safe conduct of the mail are primarily for their benefit, and that the situation is similar to that in the Howard Case in that the principal purpose of the postal system is to transmit private mail" (R. 106; 103 Fed. (2d) 452).

Without questioning the soundness of the considerations thus summarized, the decision of the Circuit Court of Appeals continues:

"We are of the opinion, however, that these considerations are outweighed by the fact that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond primarily for the Government's protection. * * * The related statutes and postal regulations all point to this conclusion. No inference may be drawn from them that Congress intended to extend the protection of the bond to private mail-users" (R. 106; 103 Fed. (2d) 452).

Thus it will be seen that the Circuit Court of Appeals first assumes that the postmaster's bond statute is for the *primary* benefit of the Government, which position would still entitle plaintiff to recover in this case, as a *secondary* beneficiary, because there is no contention in this case, either on the part of the Government or the Surety, that the Government or anyone else asserts any claim against the bond here involved, or that potential claims against it exist (R. 84). Therefore, the question whether plaintiff could have exhausted the bond to the prejudice of the Government or anyone else is here moot, and, obviously, a final decision in this case could be so framed as to avoid its being regarded as a precedent on that point.

But, as above noted, the Circuit Court of Appeals finally

narrowed its position as to a postmaster's bond being for the *primary* benefit of the Government, by virtually holding that the bond is for the *sole* benefit of the Government, for the opinion says that "no inference may be drawn * * * that Congress intended to extend the protection of the bond to private mail-users." We respectfully submit that that position conflicts with this Court's holding in the *Howard Case*.

In view of the analogies between the statutes and bonds involved in the *Howard Case* and those here involved, the holding of the Circuit Court of Appeals, that no inference may be drawn "that Congress intended to extend the protection of the bond to private mail-users," is in conflict with the declaration made by this Court in the *Howard Case:* "Surely, it cannot be said that it appears by the statutes and by the bond in the present case that it was given for the sole use of the United States" (184 U. S. 689).

The Circuit Court of Appeals holds that the "related statutes and postal regulations all point to this conclusion"—that Congress intended primarily to protect the Government (R. 106; 103 Fed. (2d) 452). As to postal regulations, we respectfully submit that they cannot be properly considered as diminishing the effect of the postmaster's bond statute. Under 5 *U. S. C. A.*, Sec. 22, departmental regulations must be consistent with acts of Congress. This statute delegates no legislative power to a department. (*Butler vs. White* (C. C., W. Va.) 83 Fed. 578—reversed on other grounds, *White vs. Butler*, 171 U. S. 379.)

As to the only related statutes cited by the Circuit Court of Appeals (R. 106; 103 Fed. (2d) 451), 5 *U. S. C. A.*, Sec. 377, requiring bonds taken by the Post Office Department to run to the United States, presents no situation that differs from the situation in the *Howard Case*. There, too, the bond was required to run to the United States (184 U. S. 682).

Nor does the requirement of 28 *U. S. C. A.*, Sec. 732, that all suits arising under the postal laws shall be brought *in the name of the United States*, run counter to the decision in the *Howard Case* that suit may be brought in the name of the United States by one benefited by a bond given to the United States.

The decision of the Circuit Court of Appeals, to the effect that the letter of the postmaster's bond statute is to yield to a conception that when Congress required a bond to secure faithful discharge of *all duties* imposed on the postmaster by law and regulations it meant only duties to the Government and not duties imposed by regulations in favor of mail-users, is in conflict with the decision of this Court in *Crooks vs. Harrelson*, 282 U. S. 55, 60, where it was decided: "And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail."

In this connection it is to be noted that there is a conflict between the position taken by the Circuit Court of Appeals in the case at bar, and the position that it took in the *Howard Case*, under the affirming approval of this Court. There the Circuit Court of Appeals said:

> "If the statute was made to express the construction contended for, the condition would read, 'faithfully to discharge the duties of his office so far forth as they concern the United States only, * * *.' Obviously, the court cannot ingraft any such limitations on the conditions of the bond" (*Howard vs. United States*, 102 Fed. 77, 80).

The decision of the Circuit Court of Appeals is also in conflict with the decision of this Court in *Smith vs. United States*, 170 U. S. 372, 381, to the effect that fair protection of those dealing with a bonded Government official should not be defeated through "any refined reasoning."

The decision of the Circuit Court of Appeals that Congress did not intend to extend the protection of the bond to private mail-users—although the statute requires a bond to secure faithful performance of all duties imposed upon the postmaster by the laws and postal regulations—is in conflict with the decision of this Court in *Teal vs. Felton*, 12 How. 284, 13 L. Ed. 990, holding that wrongful withholding of mail matter by a postmaster from an addressee was an actionable conversion.

That the Circuit Court of Appeals confuses the right of one indirectly benefited by a *contract* to sue on it in his own name and the right of a beneficiary of an *official bond* to sue, as in this case, is shown by *United States vs. United States Lines Co.* (D. C., S. D., N. Y.), 24 Fed. Supp. 427, 429, which the Circuit Court of Appeals cites as supporting its conclusions. In holding that mail senders could not sue on a *contract* between the Government and a steamship company for the carriage of mails, the Court in the cited case thus distinguished the *Howard Case*, *supra*, *United States vs. Globe Indemnity Co.* (C. C. A. 2), 26 Fed. (2d) 191, and *United States vs. Massachusetts Bonding & Ins. Co.*, 238 N. Y. 334, 144 N. E. 631, by saying:

> "However, each of these suits was upon a bond which had been posted to secure faithful performance of his duties by a certain individual occupying a public or quasi public position. The bonds were required by statute and were intended for the benefit of members of the public who would have dealings with the one who was bonded. Those cases, involving suits on bonds, are not persuasive here."

The Court drew special attention to the discussion in the *Howard Case*, concerning an express or *implied* "right to sue given to the persons who are protected by the bond."

III.

The Decision of the Circuit Court of Appeals Is in Conflict With Decisions of Other Circuit Courts of Appeals on the Same Matter.

We believe that the Circuit Court of Appeals erred when it decided:

> "These conclusions" — conclusions that a postmaster's bond was not intended by Congress to extend to the protection of private mail-users, and that no legal intendment, permitting them to sue on the bond, could be inferred—"are not inconsistent with those decisions in which the Government in actions brought in the name of the United States upon similar bonds has recovered for the theft of registered letters and the like, even in the absence of the assertion of a claim by the sender or proof of loss to the Government other than the interference with its special property right as a bailee." (R. 106-107; 103 Fed. (2d) 452-453).

If, as decided by the Circuit Court of Appeals, the indications are that "the statute requires a bond primarily *for the Government's protection*" (italics supplied) and will sustain no inference "that Congress intended to extend the protection of the bond to private mail-users" (R. 106; 103 Fed. (2d) 452), how could a surety be held liable on such a bond for loss of a private mail-user—for which the Government is not liable—whether the suit be brought by the mail-user or by the Government? Does not the Court overlook the basic point that the question of extent of coverage of a postmaster's bond is a matter of *substantive* law, and that if the bond covers private mail-users, the decision in *Howard vs. United States*, 184 U. S. 676, conclusively settles plaintiff's right to sue in the name of the United States?

This Court said in the *Howard Case*:

> "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and *therefore*, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States". (184 U. S. 692). (Italics supplied.)

The Circuit Court of Appeals itself recognized in *Federal Surety Co. vs. Minneapolis Steel & Machinery Co.*, 17 Fed. (2d) 242, 244, that while the right of a third party to sue on an obligation "is in a sense remedial, * * * the right to sue depends upon the substantive right of such third party under the contract."

The question presented under this particular head is whether or not the decision of the Circuit Court of Appeals is in conflict with decisions of other circuits on the substantive point as to private persons being protected by a postmaster's bond:

United States vs. American Surety Co. (C. C. A. 4), 163 Fed. 228.

Gibson vs. United States (C. C. A. 1), 208 Fed. 534.

United States Fidelity & Guaranty Co. vs. United States (C. C. A. 9), 246 Fed. 433.

(The three cases last cited are ones which the Circuit Court of Appeals finds not to be in conflict with its decision in the case at bar.)

In *United States vs. American Surety Co., supra*, a railway postal clerk's bond was conditioned substantially the same as the bond here involved, that is, to "faithfully discharge all the duties and trusts imposed on him * * * either by law or the rules and regulations of the Post Office Department.". The Government sued on the bond because

the clerk had rifled *unregistered* mail matter of its contents. The Court overruled a defense that because the Government was under no liability to the senders it could not recover on the bond (163 Fed. 231). Obviously, if the bond did not cover the senders' losses the Government would have had no standing to sue on the bond.

Gibson vs. United States, supra, was an action on a postmaster's bond. Holding that the bond, conditioned substantially the same as the one at bar, covered losses by senders of mail, *regardless of the Government's liability to the senders*, the Court said:

> "Should the government be allowed so to recover, it would hold the amount recovered upon an implied trust for the owners of the property. *To allow such a recovery would not, in our opinion, be holding the sureties to any liability not clearly within the reasonable contemplation and the intention of the parties when the bond was given.*" (Italics supplied.)

Although the action in the cited case was brought by the Government, the Court did not exclude the right of the senders to sue on the bond. The Court said:

> "Whether the owners of the letters could have sued either in their own names or in that of the United States, as in *Howard vs. U. S.*, 184 U. S. 676, * * * need not be considered" (208 Fed. 537).

In *United States Fidelity & Guaranty Co. vs. United States, supra*, it was decided that the Government could recover on a postal employee's bond the full amount of a private loss caused by default under his bond, although that was in excess of the amount of the Government's liability to the party sustaining the loss. The Court approved the statement of the Circuit Court of Appeals, Fourth Circuit, in *United States vs. Atlantic Coast Line R. Co.*, 215 Fed.

56, 59, where that Court said, with its own italicized emphasis:

> "The government could also recover the value of the mail lost for the benefit of the owners of the mail, *provided the contract did not negative the idea of liability extending that far.*"

The holding of the Circuit Court of Appeals, that the statute requiring postmasters to give bonds, and related statutes and postal regulations, do not permit an inference "that Congress intended to extend the protection of the bond to private mail-users" (R. 106; 103 Fed. (2d) 452) is in conflict with the decision rendered by the Circuit Court of Appeals, Seventh Circuit, in *Massachusetts Bonding & Ins. Co. vs. United States*, 54 Fed. (2d) 1039, 1040-1041. In that case the Court recognized that there is a natural basis for interpreting postal laws and regulations as protecting users of the mails, saying: "One using the mail has no voice in the appointment of the post office force, and no control over the handling of the mail received by the department. * * * The user of the mails can do nothing but deliver his mail to the post office."

The decision of the Circuit Court of Appeals that "The indirect benefit to the plaintiff, if the Government may maintain such an action in its interest, does not justify the present suit" (R. 107; 103 Fed. (2d) 452) is in conflict with *United States vs. Abeel* (C. C. A. 5), 174 Fed. 12. That case is on all fours with *Howard vs. United States*, 184 U. S. 676, in that it was an action on a federal court clerk's bond for misappropriating money belonging to private parties. The only difference between those two cases lay in the fact that it was the Government that sued on the bond in the *Abeel Case*. Holding that suit could be brought, in the alternative, by the Government or by the aggrieved private

parties in the name of the United States, the Circuit Court of Appeals for the Fifth Circuit said:

> "Unquestionably one entitled to a part of the fund in the hands of the clerk could sustain a suit on the clerk's bond in the name of the United States. *Howard vs. United States, supra.* But it by no means follows that on the facts stated in the petition a suit cannot be maintained by the United States without a statement that the suit is for the use of someone named in the petition."

The decision of the Circuit Court of Appeals is in conflict with *United States vs. United States Fidelity & Guaranty Co.* (C. C. A. 6), 247 Fed. 16, where it was held that the amount that the Government had paid the owner of a registered package that had been pilfered by a postal employee did not limit the amount that the Government could recover on the employee's bond. The Court said that the Government would hold the excess recovery, "upon a trust for the benefit of its injured patron. This right of recovery is rested, not only on the legal right of an ordinary bailee for hire to recover the full value of the subject of the bailment from one who has wrongfully converted it, but upon the right of the United States, as *parens patriae*, and upon principles of public policy, in the performance of its moral duty to protect the patrons of its post office establishment against theft by its unfaithful employees" (247 Fed. 18).

The decision of the Circuit Court of Appeals is in conflict with *American Surety Co. vs. United States* (C. C. A. 5), 133 Fed. 1019, a case decided in a memorandum opinion based upon the decision in *National Surety Co. vs. United States* (C. C. A. 8), 129 Fed. 70, and upon 23 *Opinions, Attorneys General*, 476, 479. We quote from the latter, which seems to have had under consideration the bond of a postal employee resembling in its condition the bond at bar:

"* * * The contract is not one of strict narrow indemnity, and whether it is called one of suretyship or fidelity insurance, its meaning and purpose are clear, viz., to assure the faithful performance of all the employee's duties, and the result, to a plain understanding, is the assumption by the obligor of liability for the consequences of all failures of the principal to perform his obligations up to the principal sum named in the bond."

IV.

The Decision of the Circuit Court of Appeals Is in Conflict With Its Own Decisions on the Same Matter in Cases Cited Below.

The decision of the Circuit Court of Appeals, to the effect that an action by the Government and an action by a private beneficiary of a postmaster's bond are not alternative remedies conflicts with the Court's own decision in *Bosler vs. United States*, 26 Fed. (2d) 4. There the action was on the bond of a depository in bankruptcy given to the United States under U. S. C. A., Tit. 11, Sec. 101, as that statute was worded prior to its amendment June 22, 1938. The Court said (p. 8):

> "In view of the foregoing considerations, our conclusion is that the suit was properly brought in the name of the United States. In this holding, however, we do not mean to be understood as deciding that the suit might not be brought by one or more of the creditors in the name of the United States. See *Howard vs. United States*, 184 U. S. 676, 22 S. Ct. 543, 46 L. Ed. 754; *United States vs. Abeel*, *supra*, page 19."

The decision of the Circuit Court of Appeals is also in conflict with its own decision in *Howard vs. United States*, 102 Fed. 77, in the following particulars: (1) In the *Howard*

Case, the Court gave controlling effect to the language of the statute requiring a bond, saying: "If the statute was made to express the construction contended for, the condition would read: 'faithfully to discharge the duties of his office so far forth as they concern the United States only, and seasonably to record the decrees, judgments, and determinations of the court in cases in which the United States only is interested.' Obviously, the court cannot ingraft any such limitations on the conditions of the bond" (102 Fed. 80). (2) The Court ruled in the *Howard Case* that the relator's right to sue in the name of the United States followed relator's beneficial interest in the bond (102 Fed. 84).

The decision of the Circuit Court of Appeals is in conflict with its decision in *National Surety Co. vs. United States*, 129 Fed. 70. In that case the Court said of a letter carrier's bond—worded essentially the same as the bond here involved:

> "But the contract of a surety, like all other contracts, must have a reasonable construction—an interpretation, which, while it carefully restricts his responsibility to that which he agreed to undertake, does not fail to hold him to that liability, which by the plain terms of the contract he agreed to assume. The surety in the case in hand agreed with the United States to be liable for the faithful discharge by its principal, Eich, of all the duties and trusts imposed upon him as a letter carrier either by the postal laws of the United States, or by the rules and regulations of the Post Office Department, etc."

CONCLUSION.

In whatever light the decision of the Circuit Court of Appeals be viewed, the petition for a writ should be granted. If the *Howard Case* controls, the decision is manifestly erroneous. If the *Howard Case* does not control, then the Circuit Court of Appeals has decided an important question

of federal law which has not been, but should be, settled by this Court.

The postal system is an enduring institution, for the primary benefit of every citizen. Malone's bond, conditioned as required by statute for the faithful performance of *all* of his official duties, no distinction being made between duties to the Government and duties to users of the mails, was an assurance to the latter that they would be protected against his wrongful act or omission, within the limits of the penal sum of the bond.

So far as the legal principles here involved are concerned, there is no essential difference between the relationship of a federal district clerk to private parties and the relationship of postmasters to private parties, excepting that postmasters have more intima and infinitely more frequent contact with users of the mail than court clerks have with private litigants. The facilities of a post office are used by all citizens, whereas but comparatively few citizens have occasion to resort to the courts. Therefore, we respectfully assert that there is no sound ground on which the holding in the *Howard Case* can be reconciled with the holding of the Circuit Court of Appeals in the case at bar, that a bond of a postmaster, worded essentially the same as that of a court clerk, does not operate to the benefit of users of the mails.

Respectfully submitted,

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